



January 16, 2002

Mr. William M. Buechler  
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OR2002-0271

Dear Mr. Buechler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156780.

The Tarkington Independent School District, (the "district"), which you represent, received a request for the "Report/Results of 9/25/01 Fire Ins. (including any violations)." You claim that the requested information is excepted from disclosure under sections 552.111 and 552.125 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents are subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The information at issue is a completed report. Thus, the department must release the requested information, unless the information is expressly confidential under other law or is excepted from disclosure by section 552.108. *See id.* § 552.022(a)(1). You do not raise section 552.108. Section 552.111 of the Government Code is a discretionary exception under the Public Information Act and does not constitute

“other law” for purposes of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). We will consider whether the report is expressly confidential under other law.

You contend that the report is excepted from disclosure under section 552.125 of the Government Code. Section 552.125 of the Government Code excepts from disclosure “[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act” (the “Act”). We believe the Act is “other law” for the purposes of section 552.022. The stated purpose of the Act, article 4447cc of Vernon’s Texas Civil Statutes, “is to encourage voluntary compliance with environmental and occupational health and safety laws.” V.T.C.S. art. 4447cc, § 2. In furtherance of its stated purpose, the Act provides for the confidentiality of environmental or health and safety audits voluntarily performed by or for the owner or operator of a facility that is regulated under an environmental or health and safety law. V.T.C.S. art. 4447cc, §§ 3, 5, 6. Section 5 of the Act provides in part:

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to disclosure  
....

V.T.C.S. art. 4447cc, § 5. Section 6 provides in relevant part:

(a) The privilege described by Section 5 of this Act does not apply to the extent the privilege is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared.

(b) Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this Act if the disclosure:

....

(3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.

....

(d) Information that is disclosed under Subsection (b)(3) of this section is confidential and is not subject to disclosure under Chapter 552, Government Code. A public entity, public employee, or public official who discloses information in violation of this subsection is subject to any penalty provided in Chapter 552, Government Code . . . .

V.T.C.S. art. 4447cc, §6.<sup>1</sup>

An audit report is defined as a "report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and safety audit," including "memoranda and documents analyzing" an audit report. V.T.C.S. art. 4447cc, § 4. Section 3 of the Act defines "environmental or health and safety audit" as follows:

(3) "Environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

V.T.C.S. art. 4447cc §3. In this case, even assuming the inspection was of compliance with environmental or health and safety laws, a conclusion we do not reach, the inspection was not conducted by an owner operator, an employee or an independent contractor of the district. Consequently, the inspection was not "an environmental or health and safety audit." Therefore, the inspection report at issue was not produced from an "environmental or health and safety audit" so as to meet the section 4 definition of "audit report."

Furthermore, section 8(a) excludes the following types of information from the privilege against disclosure given by the Act:

(1) a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law;

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<sup>1</sup> Section 12 states that "[t]he privilege created by this Act applies to environmental or health and safety audits that are conducted on or after the effective date of this Act," which is September 1, 1997. V.T.C.S. art. 4447cc, § 12. *See also* Texas Environmental, Health, and Safety Audit Privilege Act, 74<sup>th</sup> Leg., R.S., ch. 219, §§ 5, 6, 1995 Tex. Gen. Laws 1963, 1965-66 (predecessor statute providing for confidentiality of audits conducted prior to September 1, 1997).

(2) information obtained by observation, sampling, or monitoring by a regulatory agency; or

(3) information obtained from a source not involved in the preparation of the environmental or health and safety audit report.

V.T.C.S. art. 4447cc, § 8(a). The submitted report indicates that the inspection was conducted by the State Fire Marshall's Office pursuant to section 417.008 of the Government Code, a provision concerned with the State Fire Marshall's right of entry, examination and correction of dangerous conditions. Thus, we believe the report was required by a regulatory agency under state environmental or health and safety law. Furthermore, we believe the report consists of information obtained by observation or monitoring by the State Fire Marshall's Office. Thus, we believe the report is subject to both sections 8(a)(1) and 8(a)(2) of the Act. Because section 8(a) of the Act deems this type of report nonprivileged, the district may not withhold the report from the requestor under section 552.125 of the Government Code.

In summary, the submitted documents are subject to section 552.022 of the Government Code and must be released unless expressly confidential under other law. Section 552.111 of the Government Code does not constitute "other law" for purposes of section 552.022. In this case, the inspection report is of the type which the Texas Environmental Health and Safety Audit Privilege Act, article 4447cc of Vernon's Texas Civil Statutes, deems nonprivileged. Therefore, the district may not withhold the report under section 552.125 of the Government Code. The district must release the report to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling,

the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Joyce K. Lowe  
Assistant Attorney General  
Open Records Division

JKL/sdk

Ref: ID# 156780

Enc: Submitted documents

c: Mr. Kenneth R. Poland  
33 County Road 2273  
Cleveland, Texas 77327  
(w/o enclosures)